

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT EUGENE BARRY,

Petitioner,
v.

GARY SIMPSON,

Respondent.

CASE NO. C18-6003 BHS

ORDER ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION AND ISSUING A PARTIAL CERTIFICATE OF APPEALABILITY

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable J. Richard Creatura, United States Magistrate Judge, Dkt. 24, and Petitioner Robert Eugene Barry’s (“Barry”) objections to the R&R, Dkt. 25.

On October 7, 2019, Judge Creatura issued the R&R recommending that the Court dismiss Barry’s petition as time-barred. Dkt. 24. Judge Creatura concluded that even if Barry was granted equitable tolling for the period of his prior attorney’s malpractice, he fails to establish an entitlement to either statutory or equitable tolling for the period of time between when he became aware of that malpractice, June 22, 2017, to when he filed this petition, December 5, 2018. *Id.* On October 21, 2019, Barry filed objections. Dkt. 25. On October 23, 2019, the State replied. Dkt. 26.

1 The district judge must determine de novo any part of the magistrate judge's
2 disposition that has been properly objected to. The district judge may accept, reject, or
3 modify the recommended disposition; receive further evidence; or return the matter to the
4 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

5 In this case, Barry objects to the R&R arguing that he is entitled to statutory
6 tolling for the period of time that he filed for relief in state court from June 22, 2017 to
7 December 5, 2018. Dkt. 25. The State argues that Barry is not entitled to statutory
8 tolling because the state courts denied his filings as time-barred, which means the filings
9 were not "proper" as defined in 28 U.S.C. 2254(d)(2). Dkt. 26. The Court agrees on the
10 issue of statutory tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) ("When a
11 postconviction petition is untimely under state law, 'that [is] the end of the matter' for
12 purposes of § 2244(d)(2).").

13 The Court, however, is aware of authority for the proposition that attorney
14 misconduct that rises to the level of disbarment is sufficient to establish equitable tolling
15 for both the period of the misconduct and the period in which a petitioner attempts to
16 exhaust his time-barred claims in state court. In *Valenzuela v. Small*, 692 F. App'x 409
17 (9th Cir. 2017) the majority concluded as follows:

18 [The attorney's] conduct was sufficiently extraordinary to justify
19 equitable tolling not only for the period of his representation, but also for
the period (from November 6, 2008 to July 8, 2009) in which [the
20 petitioner's] properly filed pro se petitions were pending before the
California Court of Appeal and the California Supreme Court. [The
21 petitioner's] federal filing was thus timely.

1 *Id.* at 410. The undersigned did not agree with that conclusion. *See id.* (Settle, J.,
2 concurring) (“In my view, the impediment that stood in [the petitioner’s] way from
3 November 6, 2008 to July 8, 2009 was the absence of an exhausted claim.”). Regardless,
4 applying the majority’s conclusion to Barry’s facts, the Court concludes that Barry has
5 not established an entitlement to equitable tolling because he was represented by counsel
6 during the relevant period and could have filed a protective petition for his unexhausted
7 claims while he pursued relief in state court. *See id.* (“our circuit recently held that
8 district courts may accept petitions asserting only unexhausted claims.”) (citing *Mena v.*
9 *Long*, 813 F.3d 907, 912 (9th Cir. 2016)). Therefore, the Court concludes that Barry is
10 not entitled to equitable tolling from June 22, 2017 to December 5, 2018 while he
11 pursued state court relief because there was no impediment to his timely filing of this
12 federal petition.

13 Regarding a certificate of appealability, the Court concludes that Barry is entitled
14 to a certificate of appealability on the sole issue of equitable tolling for the period after he
15 became aware of his attorney’s misconduct because jurists of reason have disagreed and
16 could disagree on this issue. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

17 Therefore, the Court having considered the R&R, Barry’s objections, and the
18 remaining record, does hereby find and order as follows:

- 19 (1) The R&R is **ADOPTED in part** and **MODIFIED in part**;
- 20 (2) Barry’s petition is **DISMISSED** as time-barred;
- 21 (3) A Certificate of Appealability is **GRANTED** on the sole issue of whether
22 Barry is entitled to equitable tolling from June 22, 2017 to December 5,

1 2018 while he pursued state court relief and **DENIED** as to all other issues;

2 and

3 (4) The Clerk shall enter a JUDGMENT and close the case.

4 Dated this 24th day of January, 2020.

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7 BENJAMIN H. SETTLE
United States District Judge